United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21423

195

CLYDE MONTGOMERY

Appellant

v.

UNITED STATES OF AMERICA

Appellee

No. 21424

NYLES MONTGOMERY

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Consolidated Appeals From Convictions in the United States District Court for the District of Columbia

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QUESTIONS PRESENTED

1. Did the trial court err in refusing to give the requested instruction that the defendants had a right to resist an unlawful arrest provided only reasonably necessary force was used to avoid it?

2. Whether, in a trial upon an indictment for assaulting police officers, the court should direct an acquittal if the evidence fails to prove that the defendants were without justifiable and excusable cause in resisting arrest?

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BRIEF FOR APPELLANTS

Jurisdictional Statement

The defendants were charged in a four count indictment with assaulting two police officers in violation of D. C. Code

§ 22-505(a). The United States District Court had jurisdiction pursuant to D. C. Code § 11-521 (1967).

This court has jurisdiction pursuant to the Act of June 25, 1948, 62 Stat. 929, as amended, U.S.C., Title 28, § 1291 (1948).

Statement of the Case

On October 17, 1966, a four count indictment was filed in the United States District Court for the District of Columbia charging each of the defendants[1/] in two counts with assaulting two members of the police force in violation of D. C. Code § 22-505(a) (1961). Each defendant pleaded not guilty to each of the two counts pertaining to him. A jury trial commenced on July 11, 1967, in the United States District Court for the District of Columbia, Judge Hart presiding. Briefly, the evidence at trial showed the following.

On September 5, 1965, at approximately 5:00 p.m., two police officers in a scout car were summoned by radio dispatch to report to the scene of an alleged disturbance at 1136 Seventh Street, N. E., in the District of Columbia. At the trial, Mrs. Murray who lived next door testified that she saw a woman known as Gussie in the yard next to her house with a knife, an unidentified man with a brick and an unidentified man outside the gate swinging a

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1/ Appellants will be referred to herein as defendants.

chain, all of whom were "swearing, talking very loud, and unruly" (Tr. 78).

Her husband, Robert L. Murray, testified that he observed "several people in the yard, seemed to be fighting. One had -- one woman had a knife, one fellow was swinging a chain, and another fellow had a brick, and they were using vulgar language, and some of them were scuffling" (Tr. 69). He recognized the woman with the knife as Gussie (Tr. 69). Mr. Murray testified that approximately eight or ten people were in the neighbor's front yard, moving around, some scuffling and threatening each other, and one swinging a chain (Tr. 74). Although Mr. Murray could not remember what the defendants were wearing, he testified that the two men who were later escorted from 1136 Seventh Street by the police were "two of the same men that were fighting" (Tr. 71). Murray never testified that the defendants were fighting when the police were present. On this point, he testified that when the police turned the corner "they all went in the house" at 1136 Seventh Street, N. E. (Tr. 70).

Officer Haynes testified that when he arrived in the vicinity of 1136 Seventh Street, N. E., he observed "one subject have a choke hold on another one, on another male. I observed a gentleman swinging a chain about his head. And I observed the subject with a brick in his hand, and another gentleman standing there yelled: Police. Several of them ran down Morton Place. . ." (Tr. 111-12). He testified that he saw no woman at the scene and

that as he approached in his scout car, "three gentlemen" went into the house at 1136 Seventh Street, N. E. (Tr. 112).

When the scout car was stopped, Haynes ordered a patrol wagon to the scene (Tr. 112). He then went to the front door of 1136 Seventh Street and knocked (Tr. 112-13). According to Haynes, he was first greeted by a man's voice from within the house, "F--- police. . .kick the damn door down if you have got a warrant," following which, Haynes testified, he was invited in by Gussie Jones (Tr. 113).[2/] Haynes then testified that while standing in the hallway he was ordered to leave by defendant Clyde Montgomery who allegedly "started pushing us" toward the front door. At that point, Officer Haynes testified he took Clyde Montgomery by the arm whereupon he resisted and retreated to a seat on the couch in the living room (Tr. 115-16). Officer Klepfel who was with Haynes during the alleged hallway episode stated that Haynes placed Clyde Montgomery under arrest in the hallway for disorderly conduct (Tr. 172). At that point, police reinforcements arrived whereupon Haynes again "got him by the arm," following which Officers Harris and Haynes attempted to arrest Clyde Montgomery (Tr. 83, 117), and Officer Cochran attempted to arrest Nyles Montgomery (Tr. 83-84, 117). Officer Klepfel arrested the third man in the room, Mack Edwards, who offered no resistance, and escorted him to the patrol wagon (Tr. 82, 83, 116).

At the close of the Government's case, defendants moved for

2/ The defendants' evidence disputes that the officers were invited in (Tr. 180, 217).

judgment of acquittal on the ground that the Government had failed to prove an element of the offense charged, namely, that the defendants' resistance was without justifiable and excusable cause. Specifically, defendants urged acquittal as a matter of law because the police officers' arrests of the defendants were admittedly for a misdemeanor which the evidence showed was not committed by defendants in the officers' presence. Hence the arrests were unlawful and therefore as a matter of law defendants had a right to resist by reasonable force. The court denied the motion (Tr. 152-53).

In support of their not guilty pleas defendants testified and produced two eye witnesses to the episode on September 5, 1966. All their testimony was to the effect that the defendants were not in front of 1136 Seventh Street, N. E. at the time of the alleged disturbance (Tr. 179, 203, 235-37, 258); that the police officers upon arriving on the scene, knocked on the door and when opened by Gussie Jones, barged in without invitation to enter and announced that the occupants, who included Clyde Montgomery, Nyles Montgomery and Mack Edwards, were under arrest (Tr. 180, 204).

When Clyde Montgomery asked the reason for the arrest, he was told for "disorderly conduct." Clyde Montgomery denied being disorderly (Tr. 204) and turned his back on the officers (Tr. 238). At that point Clyde Montgomery was forcibly held around the neck and then repeatedly struck by one or more of the officers with nightsticks (Tr. 239). The same treatment was accorded Nyles Montgomery (Tr. 181-83, 204, 239-40, 257-261). As a result of the

beatings with nightsticks, both defendants suffered multiple lacerations of the scalp which required hospitalization (Defendants' Exhs.4A-C, 5A-C; Tr. 273).

At the close of all the evidence, defendants renewed their motion for acquittal for the reason already stated. The motion was denied (Tr. 274).

Defendants requested the trial court to give the prepared written instructions on the right to resist an unlawful arrest. (Defendants' Instructions, Nos. 1-4). These instructions were patterned after the language used in Instruction No. 56 of the Criminal Jury Instructions for the District of Columbia and Abrams v. United States, 237 F.2d 42, 99 U. S. App. D. C. 46 (1956). The court denied the request (Tr. 275). Defendants then requested Criminal Jury Instruction 56 dealing with the right to resist an unlawful arrest (Tr. 276). The court denied the request (Tr. 276). Counsel for defendants excepted to the court's denials (Tr. 276, 308). The court refused to instruct the jury that a person has a right to resist an unlawful arrest. Instead it instructed that the defendants could resist only if excessive force was used (Tr. 305-06, 313-19).

On July 14, 1967, the jury returned verdicts of guilty on each of the two counts applicable to each defendant. A Motion for Judgment of Acquittal Notwithstanding the Verdict of Guilty, Or, In the Alternative Motion For New Trial was denied on August 1, 1967. On September 8, 1957, the defendants were sentenced to one to three

years imprisonment. The defendants filed their notice of appeal on October 3, 1967.

Statement of Points

1. The trial court erred in refusing to give the requested jury instruction that a person may resist an unlawful arrest provided he uses only such force as appears reasonable under the circumstances.

2. The trial court erred in refusing to grant defendants' motions for judgment of acquittal. The record shows that the arrests were illegal because the defendants did not threaten, attempt or commit a misdemeanor in the presence of the arresting officers. Since the defendants had a right to resist an unlawful arrest, the Government failed to prove that the defendants did not have justifiable and excusable cause to resist the arrest.

Summary of Argument

At the outset of the trial in this case, the trial court adopted the position that the law in the District of Columbia was that a person may not under any circumstances resist an unlawful arrest. The court stated (Tr. 29): "He does not have the slightest right to resist an unlawful arrest and I will so instruct the jury. . .It is his duty to submit to the unlawful arrest and let the Court settle it."

The court adhered to its position and at the close of the evidence, it refused to give the standard instruction in the District

of Columbia to the effect that a person can use reasonably necessary force to avoid an unlawful arrest. The record showed the arrests of the defendant to be for alleged misdemeanors not committed or attempted or threatened in the presence of the arresting officers. Thus the court committed reversible error by refusing to instruct the jury that the defendants could resist provided unnecessary force was not used.

A necessary element of the offense with which defendants were charged is that the resistance to arrest was "without justifiable or excusable cause." D. C. Code § 22-505(a). Inasmuch as each element of an offense must be proved beyond a reasonable doubt, acquittal is required as a matter of law when the Government fails in its proof of any constituent element. In this case the evidence at all stages of the trial showed that the arresting officers attempted to and did effect an illegal arrest. They placed the defendants under arrest for alleged disorderly conduct in the form of a fight or disburbance in front of the house in which the arrest occurred. There is no evidence that the defendants were disorderly in the presence of the arresting or any other police officers. Since the law in the District of Columbia is clear that a person may resist an unlawful arrest by reasonable means, the defendants were shown to have justifiable and excusable cause to resist. Since the absence of such cause is necessary for a violation, the trial court erred in refusing to grant defendants' motions for acquittal.

STATUTES INVOLVED

D. C. Code § 22-505(a) (Assault on member of police force):

> Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or or member of any police force operating in the District of Columbia, or any officer or employee of any penal or correctional institution in the District of Columbia, or any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia, whether such institution or facility is located within the District of Columbia or elsewhere, while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both.

D. C. Code § 22-1107 (Unlawful assembly--Profane and indecent language):

> It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense

was committed, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both for each and every such offense. (July 29, 1892, 27 Stat. 323, ch. 320, § 6; July 8, 1898, 30 Stat. 723, ch. 638; June 29, 1953, 67 Stat. 97, ch. 159 § 210.)

D. C. Code § 22-1121 (Disorderly conduct -- Generally):

> Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby--
>
> (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> (2) congregates with others on a public street and refuses to move on when ordered by the police;
>
> (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;
>
> (4) interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or
>
> (5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees, shall be fined not more than $250 or imprisoned not more than ninety days, or both. (June 29, 1953, 67 Stat. 98 ch. 159 § 211a.)

D. C. Code § 4-140 (Arrests without warrant):

> The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District,

but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law. (R.S., D C., § 397.)

ARGUMENT

A. The Court Should Have Instructed The Jury That A Person Has The Right To Resist An Unlawful Arrest Provided Excessive Force Is Not Used In Resisting

(With respect to Point 1, appellants desire the court to read the following pages in the reporter's transcript: Tr. 29, 30, 32, 42, 46-56, 59-60, 69, 71, 74, 78, 81-84, 92, 111-13, 120, 126, 152-53, 171, 172, 175-76, 179, 180, 181-83, 203, 204, 235, 239-40, 247, 272-73, 275-76, 305-06, 308, 313, 319.)

As early in the trial as questioning of the prospective jury panel by counsel for defendants, the trial court took the position that the law in the District of Columbia did not permit resistance to an unlawful arrest (Tr. 29). The trial court's view of the law which was repeated several times in the course of the trial is epitomized by this statement (Tr. 43-44):

> "If a police officer goes up and arrests somebody unlawfully, it is the duty of the person unlawfully arrested to submit, to accompany the officer to the police station, and the processes of law will see that the matter is taken care of. It is simple.
>
> "Now, as I said, if an officer uses more force than is necessary to maintain his arrest, then, of course, a person has a right to resist that use of excessive force to maintain the arrest.
>
> "In other words, suppose a defendant submits to arrest and isn't doing anything, then the officer just can't start beating him over the head with a billyclub.

"Now, as far as I am concerned, this is the law and will be the law in this case. If your defendants should be convicted, you can test it upstairs."3/

At the close of all evidence, the court instructed the jury as follows on the question of a person's right to resist an unlawful arrest (Tr. 305-06):

"A person acts without justifiable or excusable cause if he assaults, resists, opposes, impedes, intimidates or interferes with a police officer while the officer is engaged in the making or maintaining of an arrest, provided that the officer uses only such force as appears reasonably necessary under the circumstances to effect and maintain the arrest. In making and maintaining the arrest, the measure of reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary. If the officer employs greater force than appears reasonably necessary under the circumstances to effect or maintain the arrest, the person sought to be arrested may defend himself against the officer's excessive force by using such force as appears reasonably necessary under the circumstances to protect himself. If the person sought to be arrested defends himself against excessive force by using only such force as appears reasonably necessary under the circumstances to protect himself, he acts with justifiable and excusable cause.

"When a police officer who is engaged in or on account of the performance of his official duties tries to arrest a person and does not use unnecessary force, that person has no right to resist. If he feels that the arrest is illegal and without probable cause, he must still submit and let the court later decide whether the arrest was legally justified. (Emphasis added.)

"If a person resists an arrest, the police have the right, in fact the duty, to use such force as is reasonably necessary to make and maintain the arrest."

3/ For similar expressions of the trial court's view of the law on this question, see Tr. 30, 32, 42, 46-56.

The court specifically refused to give defendants' requested instruction on the right to resist an unlawful arrest (Defendants' Instruction No. 4; Tr. 275). Following the refusal, defendants requested the court to give Instruction No. 55 of the Criminal Jury Instructions for the District of Columbia (1966), the last paragraph of which deals with the right to resist an unlawful arrest in these terms:

> "A person also acts with justifiable and excusable cause if he is resisting an unlawful arrest, provided that he uses only such force as appears reasonably necessary under the circumstances to avoid the unlawful arrest. However, if he uses greater force than appears reasonably necessary under the circumstances, he acts without justifiable or excusable cause."

The court refused to include the quoted paragraph in its instruction (Tr. 276, 306). Defendants claim that such refusal was prejudicial and reversible error.

This court, relying upon United States v. Di Re, 332 U. S. 581, 594 (1947), has specifically declared that "One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases." Abrams v. United States, 237 F.2d 46, 99 U. S. App. D. C. 46 (1956), cert. denied, 352 U. S. 1018 (1957). In Abrams, the issue was whether the instruction on the right to resist an unlawful arrest was properly refused. The court held that it was because the instruction which did not limit the resistance to reasonable force was too broad.

In this case the defendants requested instructions on the right

to resist an unlawful arrest both of which were framed in the language of Abrams limiting the resistance to reasonable force under the circumstances.

In the Abrams case the court cited John Bad Elk v. United States, 177 U. S. 529 (1900), a case strikingly similar to the instant case which held that the refusal to instruct the jury that the defendant could resist an unlawful arrest warranted reversal. There the defendant was charged with murdering a policeman in South Dakota who attempted to arrest him for a misdemeanor committed out of the presence of the policeman. The court found that under South Dakota law such an arrest would have been illegal. Id. at 535. Since the evidence presented a jury issue whether the arresting officers brandished their guns in making the arrest, it was held erroneous for the trial court to instruct that the defendant had no right to resist:

> "If the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest." Id. at 535. (Emphasis added.)
>
> * * * * * *
>
> "....The charge presented the plaintiff in error to the jury as one having no right to make any resistance to an arrest by these officers, although he had been guilty of no offense, and it gave the jury to understand that the officers, in making the attempt, had the right to use all necessary force to overcome any and all opposition that might be made to the arrest. . . .Instead of saying that the plaintiff in error had the right to use such force as was absolutely necessary to resist an attempted illegal arrest, the jury were

> informed that the policemen had the right to use all necessary force to arrest him, and that he had no right to resist. . . .The plaintiff in error was undoubtedly prejudiced by this error in the charge, and the judgment of the court below must therefore be reversed. . ." Id. at 537-38. (Emphasis in original.)

Another case of instructive importance is Curtis v. United States, 222 A.2d 840 (D. C. Mun. App. 1966). There the defendant was placed under arrest for vagrancy whereupon she became boisterous in her opposition to the arrest. At that point the officer arrested her for disorderly conduct and in a search incident thereto uncovered narcotics on her person. On appeal from convictions of vagrancy, disorderly conduct and possession of narcotics, the court found that from the record no misdemeanor was committed in the officer's presence, hence the arrest for vagrancy was unlawful. Similarly, the court held that the arrest for disorderly conduct was unlawful because her boisterous conduct was a form of resistance to the illegal arrest for vagrancy. The court held (Id. at 842):

> "The law is well settled that reasonable means including physical force may be used to resist an illegal arrest. Abrams v. United States, 99 U. S. App. D. C. 46, 237 F.2d 42 (1956); Williams v. State, 204 Md. 55, 102 A.2d 714 (1954); State v. Robinson, 145 Me. 77, 72 A.2d 206 (1950); People v. Cherry, 307 N. Y. 308, 121 N. E. 2d 238 (1954); Walters v. State, 403 P.2d 267 (Okla. Crim. App. 1965); Masden v. State, 156 Tex. Cr. R. 538, 244 S. W. 2d 228 (1951); 6 C.J.S. Assault and Battery § 92 (1937). This rule of law is based on the principle that an illegal arrest is an assault and battery, and one so arrested may either turn and walk away or match force with force to effect his escape. State v. Robinson, supra; People v. Cherry, supra; 4 Am. Jur. Assault and Battery § 41 (1936)."

This principle that a person can lawfully resist an unlawful arrest provided excessive force in resisting is not used has been inherent in our Anglo-American jurisprudence since the signing of the Magna Carta in 1215. Section 39 of the Magna Carta states: "No free man shall be taken or imprisoned or dispossessed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land." The historical development of the right to resist can be traced through modern American cases and authorities. E.g., Roberson v. State, 43 Fla. 156, 29 So. 535 (1901); People v. Briggs, 25 App. Div. 2d 50, 266 N. Y. S. 2d 546, 548-49 (1965); Robison v. United States, 4 Okla. Crim. 336, 111 P. 984 (1910); State v. Rousseau, 40 Wash. 2d 92, 241 P. 2d 447 (1954); Bishop, New Criminal Law § 868(2) (8th ed, 1892); Perkins, Criminal Law 423-24 (1957); Wharton's Criminal Law and Procedure § 1628 (1957); Orefield, Criminal Procedure From Arrest to Appeal 27 (1947). As shown above, this rule of law has been followed in this jurisdiction in Abrams v. United States, supra, and Curtis v. United States, supra.

In fact, only six states have adopted the view of the trial court that no resistance to an illegal arrest can be justified. Five of these states have enacted statutes patterned after the Uniform Arrest Act § 5.[4/] See Warner, Uniform Arrest Act, 28 Va. L. Rev. 315, 343 (1942).

4/ R. I. Gen. Laws Ann. § 12-7-10 (1956); N. H. Rev. Stat. Ann. 594:5 (1955); Del. Code Ann. tit. 11, § 1905 (1953); Cal. Penal Code § 835(a) (Supp. 1965); Ill. Stat. Ann. ch. 38 § 7-7 (1964).

New Jersey is the only state that has judicially articulated a departure from the common law rule. In State v. Koonce, 89 N. J. Super. 169, 214 A.2d 428 (1965), cited by the Government at trial in support of its opposition to the defendants' requested instruction (Tr. 42), the police arrested Koonce for a misdemeanor not committed in the officer's presence. When Koonce and his mother resisted his arrest, they were charged with assaulting a police officer. The appellate court gave its approval to Section 5 of the Uniform Arrest Act and held that thereafter in New Jersey it would be unlawful to resist an unlawful arrest. It is vital to note, however, that the court's decision applied prospectively. That is, the convictions of Koonce and his mother were reversed because the court realized that it would be "fundamentally unjust to render criminal by an overruling decision, conduct which was not criminal when it occurred. This would be equivalent in effect on the accused of an ex post facto statute." 214 A.2d at 436-37.5/ Thus, even if the court in the instant case should depart from the common law rule, reversal as to these defendants is appropriate.

The rationale underlying Koonce is unimpressive as a logical statement. The court held that the interest of the public in avoiding civil disorder sparked by resistance to arrest outweighed the individual's right to be free from unlawful restraints on his liberty. The court made a subjective evaluation that by requiring submission to police abuse would bring about social peace and tran-

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5/ The significance of the Koonce decision is further diluted by the fact that it was not decided by the highest court of New Jersey.

quility. This is at best an intuitive conclusion. The Report of the National Advisory Commission on Civil Disorders (released March 3, 1968), ranked abusive police practices as the most deeply held grievance among that segment of the public involved in civil disorders in American cities. It seems clear that the objectives of maintaining civil order will not be served by compelling the citizenry to submit meekly to the policeman's abuse of his authority to arrest.

The subsidiary reason supporting Koonce was that modern criminal procedures eliminate unnecessary imprisonment pending trial. In other words, because of progress in criminal procedures in other areas of the law, regression in the area of unlawful arrests by police was tolerable. Again the court reached for the expedient solution that the private citizen's loss of liberty is the price that must be paid for inevitable police misconduct. Such a doctrine has no place in view of the recent advancements in criminal procedures aimed at eliminating unnecessary restraints on the accused. E.g., Mallory v. United States, 354 U. S. 49 (1957); Bail Reform Act, June 22, 1966, 80 Stat. 214, 18 U.S.C.A. § 3146 (1967 Supp.). It is submitted that the concern to avoid restraints on liberty should be heightened in the case of the person victimized by an unlawful arrest, not relaxed as in Koonce.

The evidence in this case fully supported the requested instruction on the right to resist an unlawful arrest. The record is clear that the only reason for ordering the defendants under

arrest was their alleged involvement in the disorderly conduct complained of by Mr. and Mrs. Murray (Tr. 59-60, 92, 126, 173, 204, 247).

It was admitted that the officers had no warrants for defendants' arrest (Tr. 120). Since disorderly conduct is a misdemeanor, it must be committed, threatened or attempted, in the presence of the arresting officer in order for a warrantless arrest to be legal. D. C. Code § 4-140. In this case there is no evidence that the defendants were disorderly in the presence of the arresting officers before being placed under arrest. The policemen first on the scene were Officers Haynes and Klepfel. Neither testified that he saw either defendant engaging in the alleged disturbance in front of 1136 Seventh Street, N. E. Haynes testified that he saw "one male having a choke hold on another. . .the gentleman swing a chain about his head. . .the subject with a brick in his hand and another gentleman standing there yelled 'Police' [and] the three gentlemen that were left went into the house. . ." (Tr. 111-12). At no time did Haynes identify the defendants as participants in what he said he observed.

Similarly, Klepfel who was driving the squad car, did not identify the defendants as being disorderly. He testified that while watching the road in front of him, and at a distance of more than one hundred feet from 1136 Seventh Street (Tr. 176), he saw "a crowd outside and apparently three or four men were engaged in a fisticuffs and upon seeing the scout car, three of them ran inside 1136 Seventh

Street, and two ran down Orleans Place, Northeast" (Tr. 171). When pressed for an identification, Klepfel could only identify the defendants as among those who, when he was one hundred feet away, went into the house (Tr. 175-76).

The other arresting officer, Officer Harris, arrived on the scene after Haynes had ordered the defendants under arrest and their resistance had begun (Tr. 81-84). Thus his involvement simply added force to the illegal arrest already initiated which in turn allowed the defendants to increase their resistance provided such increased resistance did not exceed the force used by the arresting officers. In this connection, the evidence does not permit the conclusion that the defendants' resistance exceeded the officers' force in effecting the arrests. Although Officer Harris suffered a cut lip, nose and forehead, his injuries pale in comparison to the injuries inflicted upon the defendants by the repeated blows to the head by three officers with their eighteen-inch wooden billy-clubs (Tr. 182, 204, 237-40, 257-60). At the very least the trial court should have submitted to the jury whether the defendants used excessive force in resisting the unlawful arrests. As mentioned, the trial court refused to instruct that any resistance to an unlawful arrest could be permitted. On the evidence in this case, there was ample evidence to allow the jury to decide whether the arrests were unlawful so as to allow the defendants to resist by reasonable force. Its failure to instruct as requested constituted reversible error here as it did in John Bad Elk v. United States, supra.

B. The Evidence Failed As A Matter of Law To Establish That Defendants Were Without Justifiable and Excusable Cause To Resist The Arrests

(With respect to point 2, appellants desire the court to read the following pages in the reporter's transcript: Tr. 59, 69, 70-74, 81, 83, 87, 90, 92-94, 111-13, 120, 126, 151-52, 171, 172, 175, 176, 179, 180, 181-83, 204, 205, 217, 235-38, 239-40, 247, 258, 257-61, 272-73, 274-75.)

The essential elements of a violation of D. C. Code § 22-505(a) are:

(1) That this complainant was a member of a police force operating in the District of Columbia; and

(2) That the defendants assaulted, resisted, opposed, impeded, intimidated or interfered with the complainant; and

(3) That at the time the defendant did so, the complainant was engaged in or on account of the performance of his official duties; and

(4) That at the time he did so, he knew that the complainant was a member of such a police force; and

(5) That the time that defendant did so, he intended to assault, resist, oppose, impede, intimidate, or interfere with the complainant; and

(6) That the defendant did so without justifiable and excusable cause.

It is fundamental that the Government must prove beyond a reasonable

doubt every element of the offense charged. McAffee v. United States, 70 U. S. App. D. C. 142,105 F.2d 21 (1939). In this case the Government has failed to prove that defendants were without justifiable and excusable cause to resist, assault, oppose, impede, intimidate or interfere with the arresting police officers.

The law is settled that a person in the District of Columbia who is the victim of an unlawful arrest may resist provided he does not resist by unreasonable force. Abrams v. United States, supra; Curtis v. United States, supra. Applying this rule to the offense charged here, it means that a person being subjected to an unlawful arrest has justifiable and excusable cause to resist by reasonable force. Clearly a person who has an "undoubted right to resist an unlawful arrest" has "justifiable and excusable cause" to resist. Therefore, when the evidence fails to prove that the policeman's arrest which was resisted was lawful it concomitantly fails to prove that the defendants' resistance was without justifiable and excusable cause. And, if the evidence shows that the defendants' resistance was not excessive under the circumstances, judgment of acquittal is required.

No purpose can be served by repeating the evidence already set forth which establishes the illegality of the arrests of the defendants in this case, supra at 2-6, 18-20. It is clear that they were placed under arrest without warrants for the misdemeanor of disorderly conduct not committed in the presence of police officers. The record shows that these officers contemplated making arrests at 1135 Seventh

Street prior to their entry of the premises by ordering a patrol wagon (Tr. 112). It further shows that none of the officers identified the defendants as having been disorderly prior to the officers' entry of the premises (Tr. 111-12, 171, 175-76). Further, the testimony of four witnesses indicated that the police officers entered the premises without invitation and without questioning the occupants as to whether they had been disorderly (Tr. 90, 180, 204, 217, 237, 258). They then announced that everyone was under arrest (Tr. 204).

Under these circumstances, the defendants had a right to resist the unlawful arrests by reasonable means. Abrams v. United States, supra. Since the preservation of this right constitutes justifiable and excusable cause for such resistance, the Government failed as a matter of law to prove a necessary element of the offense charged. Accordingly, the court erred in refusing to grant defendants' motions for judgment of acquittal at the close of the Government's case (Tr. 151-52), and at the close of all evidence (Tr. 274) and after the verdicts of guilty were returned.

CONCLUSION

For the reasons stated above, this court should reverse the lower court and vacate the judgments as to both defendants, or, in the alternative, reverse the lower court and remand the case for a new trial consistent with the law in the District of Columbia that

resistance to an unlawful arrest by reasonable force is permitted.

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RE 7-7777

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,423

CLYDE MONTGOMERY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,424

NYLES MONTGOMERY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
SEYMOUR GLANZER,
CARL S. RAUH,
Assistant United States Attorneys.

Cr. No. 1191-66

QUESTION PRESENTED

In the opinion of appellee, the following question is presented:

In light of modern demands for law and order in an urbanized society and the virtually immediate court process surrounding one arrested and accused of a crime and the lack of any binding precedent squarely holding to the contrary, did the District Court commit reversible error in following sound public policy and refusing to instruct the jury that a person may use force to resist an unlawful arrest? In any event, did the District Court commit reversible error in refusing to give this instruction, where (a) there was no evidence to support such an instruction and (b) the arrest was lawful as a matter of law?

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,423

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v.

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants Clyde and Nyles Montgomery were jointly charged in a four-count indictment with assaulting, resisting and interfering with two police officers in viola-

tion of 22 D.C. CODE § 505.[1] After trial before a jury and District Judge Hart on July 11, 12, 13 and 14, 1967, the jury returned a verdict of guilty as charged. Appellants were sentenced to imprisonment for one to three years.

The Government's Case[2]

At approximately 5:00 p.m. on September 5, 1966, a fight broke out in the front yard of 1136 Seventh Street, Northeast, Washington, D.C. (Tr. 68-69, 78). Involved in the fight were Mrs. Gussie Jones,[3] Clyde and Nyles Montgomery[4] and several other men (Tr. 69, 71, 74, 78). Two of the men involved had weapons, one had a chain and another had a brick; Mrs. Jones was armed with a long knife (Tr. 69, 74, 78). Mr. and Mrs. Robert L. Murray, who lived next door at 1134 Seventh Street, heard and observed the fighting and called the police (Tr. 67, 70, 77). The police arrived within five minutes (Tr. 78).

Uniformed officers Charles E. Haines, Jr. and Jack Klepfel. Ninth Precinct, Metropolitan Police Department, responded to 1136 Seventh Street in their scout car, arriving at approximately 5:05 p.m. (Tr. 110-11). As the scout car approached 1136 Seventh Street, Officer Haines observed a fight in front of 1136 Seventh Street; specifically, one man was choking another, a third was swinging

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[1] Clyde Montgomery was charged with assaulting, resisting and interfering with Officer Charles E. Haines, Jr. (Count 1) and Officer Carroll H. Harris (Count 2); Nyles Montgomery was also charged with assaulting, resisting and interfering with Officer Charles E. Haines, Jr. (Count 3) and Officer Carroll H. Harris (Count 4).

[2] The Government's case consisted of (1) the testimony of Mr. Robert L. Murray, Mrs. Loree H. Murray, Officer Carroll H. Harris, Officer Charles E. Haines, Jr., and Dr. Arthur Dick, (2) a stipulation as to the testimony of Dr. Dean and (3) several photographs of Officer Harris.

[3] Mrs. Jones was the lessee and occupant of 1136 Seventh Street, Northeast (Tr. 113-14, 162, 200-01, 213).

[4] See Tr. 175.

a chain, a fourth man had a brick in his hand and a fifth man yelled "police" (Tr. 111-12, 120).[5] As the scout car pulled to the curb, two of the men ran away while the other three men ran into the house at 1136 Seventh Street (Tr. 112, 120-21). The officers parked the scout car and called for assistance "in case of trouble" (Tr. 112). Officers Haines and Klepfel, who had no intention of arresting anyone, went to the front door of 1136 Seventh Street to make inquiries; Officer Haines knocked on the door (Tr. 70, 112-13, 121, 135). Mrs. Gussie Jones from inside called out, "Who is it?"; Officer Haines replied, "The Police" (Tr. 113, 121). A man's voice from inside then said, "Fuck Police. * * * Kick the damn door down if you have got a warrant" (Tr. 113). Whereupon Mrs. Jones said, "Clyde shut up. You are going to get me in trouble" (Tr. 113, 122). Mrs. Jones then opened the front door and invited the two police officers into the hallway of her house (Tr. 70, 113, 122-23). The officers asked Mrs. Jones "if there had been some problem there" to which Mrs. Jones replied that "there had been a little problem there" with some of her friends (Tr. 113-14, 123).

As Mrs. Jones began to tell the officers about what the difficulty was, Clyde Montgomery came running out of the living room into the hallway and in a rage said, "Let's see your warrant" (Tr. 114, 123). Mrs. Jones tried to calm Clyde down and told him that it was her house and the officers were invited (Tr. 114). Officer Haines also told Clyde that Mrs. Jones had invited them into her house (Tr. 115). Listening to none of this, Clyde jerked open the front door and started pushing the officers toward the front door, telling the officers to "get out"; in addition, Clyde kicked Officer Haines in the left leg (Tr. 115, 124). In response, Officer Haines took Clyde by the right arm and told him he was under arrest for disorderly

[5] Officer Haines did not observe any women in front of 1136 Seventh Street (Tr. 112).

conduct (Tr. 115, 124, 125, 126).[6] Clyde wrenched away from Officer Haines and went into the living room and sat on the sofa by his brother, Nyles Montgomery, and a third person, Mack Edwards (Tr. 115, 116, 124, 125-26).[7] Officers Haines proceeded to the sofa and again told Clyde that he was under arrest (Tr. 116). Officer Haines took Clyde by the arm and started toward the hallway with him (Tr. 116). Officer Haines told Clyde that he could be charged with the more serious crime of assault on a police officer and he should submit to the arrest (Tr. 126). At this time, Nyles Montgomery and Mack Edwards jumped up from the sofa and freed Clyde from Officer Haines' control (Tr. 82, 92, 116, 128). By this time, uniformed officers Carroll H. Harris and Alfred E. Cochran, Ninth Precinct, Metropolitan Police Department, had arrived in their patrol wagon and were present in the living room (Tr. 79-82, 91, 115-16).

Officer Klepfel placed Mack Edwards under arrest and took him outside to the patrol wagon; Mack Edwards went peacefully (Tr. 82-83, 116, 131). Officers Haines,

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[6] Of course, Clyde could also have been arrested at this time for assault on a police officer.

[7] Officer Jack Klepfel, although called as a defense witness, testified in complete accord with Officer Haines (Tr. 158-176). Officer Klepfel testified as follows: He and Officer Haines responded to 1136 Seventh Street, Northeast, on September 5, 1966 (Tr. 158-59). There was a crowd in front of 1136 Seventh Street and three or four men were fighting; when the scout car approached, three men ran into 1136 Seventh Street and two men ran away (Tr. 171). Officer Klepfel and Officer Haines then approached the front door of 1136 Seventh Street and were met by vulgar language from inside; the officers knocked on the door and were admitted into the hallway of the house by Mrs. Jones (Tr. 159, 170). The two officers spoke with Mrs. Jones about the fight in front of her house, and Mrs. Jones related that the fight "was a little misunderstanding between her friends and that everything was all right now" (Tr. 171). At this time, Clyde Montgomery came into the hallway and said something to the effect, "Look, mother fucker, unless you have a warrant, get out of this house"; Clyde then grabbed Officer Haines and attempted to shove him out the front door (Tr. 174). Officer Haines then attempted to place Clyde under arrest for disorderly conduct (Tr. 172). Clyde resisted the arrest (Tr. 172).

Harris and Cochran remained inside with Clyde and Nyles who had taken seats on the sofa (Tr. 116, 130-31). Officer Haines, in his third attempt to effect his arrest of Clyde, took hold of Clyde's arm (Tr. 93, 117, 128, 130). With this, both Clyde and Nyles jumped to their feet and Nyles shouted out, "Let's get the mother fuckers. There are only three left" (Tr. 83, 116-17, 130). Officer Harris came to Officer Haines' assistance by grabbing Clyde from behind and pinning his arms against the upper part of his body (Tr. 83, 92, 93, 95, 117).

Officer Haines, who had observed Nyles knock down Officer Cochran, rushed toward Nyles (Tr. 84, 98, 117, 130). At the same time, Nyles came at Officer Haines swinging his fists and striking Officer Haines in the stomach (Tr. 117, 123, 132). Officer Haines took out his night stick for the first time and struck Nyles who went down (Tr. 117, 123, 129, 131). Officer Haines then attempted to handcuff Nyles, but Clyde, who had broken loose from Officer Harris, kicked Officer Haines in the small of the back knocking him down (Tr. 84, 117). Meanwhile, Nyles had gotten up from the floor with a metal chair in his hands (Tr. 118). Nyles swung the metal chair at Officer Harris striking him squarely in the face (Tr. 84, 85, 98). Officer Harris was knocked out by the blow (Tr. 85, 118).

While Officer Harris was unconscious, Clyde again attacked Officer Haines, striking him in the face and knocking him down (Tr. 118). Officer Haines, by using his night stick, was finally able to subdue Clyde and with the help of Officer Klepfel, who came running back, was able to handcuff Clyde (Tr. 118, 131, 132-33). Nyles was also finally subdued by the police (Tr. 118). Officers Cochran and Klepfel placed Clyde and Nyles in the patrol wagon and they were transported to the Ninth Precinct station house (Tr. 118, 134). Officer Harris regained consciousness and left the premises along with Officer Haines; both Officers Harris and Haines were "bloody" when they left 1136 Seventh Street (Tr. 71, 137).

Both Officers Harris and Haines were admitted to the Washington Hospital Center between 8 and 9 p.m. on September 5, 1966 (Tr. 144, 146, 148, 150). Dr. Arthur Dick of the Washington Hospital Center examined Officer Harris and found his condition to be as follows:

> He [Officer Harris] was badly lacerated about the face. Specifically, a complete division of his upper lip, into the mouth. The middle portion of his nose had been torn away and separated from the floor of the nose. And then there was a laceration of the lower forehead, extending through the muscle almost to the bone. (Tr. 144-45.)

Dr. Dick successfully operated on Officer Harris (Tr. 145-46). As a result of his injuries, Officer Harris was unable to work for two weeks (Tr. 86). Officer Haines, whose injuries were less severe, was treated by Dr. Dean of the Washington Hospital Center (Tr. 150). Dr. Dean diagnosed Officer Haines' injuries as "laceration and contusions of the left eye, and multiple contusions of the legs and body" (Tr. 150).

Appellants' Case [8]

Appellants Clyde and Nyles Montgomery testified in their own behalf (Tr. 234-55, 256-71).[9] They testified that they arrived at 1136 Seventh Street, the home of Mrs. Gussie Jones, at approximately 4:00 p.m. on September 5, 1966 (Tr. 234-36, 256-57). They claimed that they remained in the living room of Mrs. Jones' house for the next hour talking to Mrs. Jones and Mack Edwards

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[8] Appellants' case consisted of (1) the testimony of appellants, Mack Edwards and Mrs. Gussie Jones, (2) photographs of appellants and (3) the hospital records of appellants.

[9] The Government did not impeach appellants with their prior convictions; Clyde Montgomery had been convicted in 1956 of assault on a police officer and Nyles Montgomery had been convicted in 1962 of petit larceny. See Appellants' Motion For Ruling That Evidence Of Prior Conviction Be Inadmissible For Impeachment Purposes filed in the District Court on July 11, 1967.

and listening to the radio (Tr. 236, 257).[10] They also claimed that they did not go outside during this time and were not involved in a fight in front of 1136 Seventh Street (Tr. 236-37, 248-49, 258).[11] The Montgomery brothers testified further that approximately an hour after arriving at Mrs. Jones' house and while they were in the living room, a knock came on the front door; Mrs. Jones opened the door and police officers came into the living room and said, "Everybody is under arrest" (Tr. 236-38, 257-58). According to the Montgomery brothers, Clyde, who had been sitting, stood up and was immediately attacked by two officers, one choked him while the other struck him with a night stick;[12] they further claimed that Nyles was also attacked and beaten with a night stick by a police officer for no apparent reason (Tr. 238-39, 258-60, 266, 269). Both Clyde and Nyles claimed that at no time did they resist the police officers (Tr. 245, 264). Nyles specifically denied hitting anyone with a metal chair (Tr. 261, 271).[13] As a result of the fight with the police, both Clyde and Nyles sustained multiple lacerations to the head (Tr. 239-40, 242, 260, 262, 273).

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[10] Mrs. Jones testified that she, Clyde and Nyles Montgomery and Mack Edwards were drinking beer during this time (Tr. 201, 203, 206, 217). Mack Edwards testified that there was not any drinking going on during this time (Tr. 194-95).

[11] Mack Edwards claimed that he was in a "dispute" in front of 1136 Seventh Street with Alton Chapman and Moses Fleming before the police arrived and that there was no loud noise, no blows struck and no weapons involved; Edwards also claimed that Clyde and Nyles Montgomery were not out front with him (Tr. 179-80, 186-87, 196-97). Mrs. Jones denied that there was any disturbance in the front yard of her house (Tr. 218, 226).

[12] Mack Edwards testified that he saw the police strike Clyde Montgomery (Tr. 181). On cross-examination, Edwards was impeached with his narrative statement to the police in which he made no mention of Clyde being struck by the police (Tr. 189-91, 193).

[13] Mrs. Jones testified on direct examination that she did not have a small metal chair in her house on September 5, 1966 (Tr. 211). On cross-examination, she was impeached with her own testimony before the Grand Jury on October 11, 1966; Mrs. Jones had told the Grand Jury that "there was a small metal chair in the living room" (Tr. 209, 212).

The District Court's Instructions

Appellants requested the trial judge to instruct the jury that a person acts with justifiable and excusable cause under 22 D.C. CODE § 505 if he uses force to resist an unlawful arrest, provided he uses no more force than appears reasonably necessary (Tr. 275-76). The trial judge refused to give this instruction because it did not express the law in this jurisdiction (Tr. 275-76).[14] Instead, the trial judge gave the following instruction:

> A person acts without justifiable or excusable cause if he assaults, resists, opposes, impedes, intimidates or interferes with a police officer while the officer is engaged in the making or maintaining of an arrest, provided that the officer uses only such force as appears reasonably necessary under the circumstances to effect and maintain the arrest. In making and maintaining the arrest, the measure of reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation

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[14] The trial judge found no case binding upon him that squarely held that a person has a right to use force to resist an unlawful arrest (Tr. 47, 49). The trial judge stated what he believed the law to be:

> * * * If a police officer goes up and arrests somebody unlawfully, it is the duty of the person unlawfully arrested to submit, to accompany the officer to the police station, and the processes of law will see that the matter is taken care of. It is simple.
>
> Now, as I said, if an officer uses more force than is necessary to maintain his arrest, then, of course, a person has a right to resist that use of excessive force to maintain the arrest.
>
> In other words, suppose a defendant submits to arrest and isn't doing anything, then the officer just can't start beating him over the head with a billyclub.
>
> Now, as far as I am concerned, that is the law and will be the law of this case. * * * (Tr. 43-44.)

The trial judge also found that the arrest of appellant was lawful (Tr. 152, 153). The trial judge said, "I don't think there is the slightest doubt that they [the Government] have proved probable cause for an arrest" and "(I)t is certainly shown here that there was every justification for arresting both the Defendants" (Tr. 152, 153).

of the arresting officer, would have deemed necessary. If the officer employs greater force than appears reasonably necessary under the circumstances to effect or maintain the arrest, the person sought to be arrested may defend himself against the officer's excessive force by using such force as appears reasonably necessary under the circumstances to protect himself. If the person sought to be arrested defends himself against excessive force by using only such force as appears reasonably necessary under the circumstances to protect himself, he acts with justifiable and excusable cause.

When a police officer who is engaged in or on account of the performance of his official duties tries to arrest a person and does not use unnecessary force, that person has no right to resist. If he feels that the arrest is illegal and without probable cause, he must still submit and let the court later decide whether the arrest was legally justified.

If a person resists an arrest, the police have the right, in fact the duty, to use such force as is reasonably necessary to make and maintain the arrest. (Tr. 305-06.)

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 505(a) provides:

> Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia, or any officer or employee of any penal or correctional institution of the District of Columbia, or any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia, whether such institution or facility is located within the District of Columbia or elsewhere, while engaged in or on account of the performance of his official duties, shall be fined not more

than $5,000 or imprisoned not more than five years or both.

[The first assault on a police officer statute in the District of Columbia was enacted by Congress in 1861. 12 Stat. 324.]

SUMMARY OF ARGUMENT

Appellants contend that it was reversible error for the District Court to refuse to instruct the jury that a person may use force to resist an unlawful arrest. We believe, in light of modern demands for law and order in an urbanized society and the virtually immediate court process surrounding one arrested and accused of a crime and the lack of any binding precedent squarely holding to the contrary, that the District Court did not commit reversible error in following sound public policy and refusing to instruct the jury that a person may use force to resist an unlawful arrest. In any event, the District Court did not commit reversible error in refusing to give this instruction because there was no evidence to support such an instruction. Both appellants specifically testified at trial that they did not resist arrest. Finally, we believe that the District Court did not commit reversible error in refusing to give this instruction because the District Court determined as a matter of law that the arrest was lawful.

ARGUMENT

The District Court did not commit reversible error in refusing to instruct the jury that a person may use force to resist an unlawful arrest.

(Tr. 50, 82, 84, 85, 92, 98, 115-18, 123-26, 128, 130, 152, 153, 236-39, 245, 257-61, 264, 266, 269, 271)

Appellants contend that it was reversible error for the District Court to refuse to instruct the jury that a person acts with justifiable and excusable cause under 22 D.C. CODE § 505 if he uses force to resist an unlawful arrest, provided he uses no more force than appears reasonably

necessary. We believe, in light of modern demands for law and order in an urbanized society and the virtually immediate court process surrounding one arrested and accused of a crime and the lack of any binding precedent squarely holding to the contrary, that the District Court did not commit reversible error in following sound public policy and refusing to instruct the jury that a person may use force to resist an unlawful arrest. In any event, the District Court did not commit reversible error in refusing to give this instruction since there was no evidence to support such an instruction. There was no testimony at trial to the effect that appellants were resisting an unlawful arrest. Both appellants testified that they did not resist arrest; rather, they claimed that several police officers barged into the living room of Mrs. Jones' house and started beating them. The Government's evidence showed that appellants were lawfully placed under arrest and that thereafter appellants viciously attacked the police. Finally, we believe that the District Court did not commit reversible error in refusing to give this instruction because the District Court determined as a matter of law that the arrest of appellants was lawful; therefore, no reason existed for the District Court to instruct the jury that a person may use force to resist an unlawful arrest (Tr. 152, 153).

(A)

To our knowledge, there is no decision binding on the District Court in this jurisdiction that squarely holds that a person may use force to resist an unlawful arrest.[15]

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[15] The three cases most frequently cited in this jurisdiction for the proposition that a person may use force to resist an unlawful arrest are (1) *Abrams* v. *United States*, 99 U.S. App. D.C. 46, 237 F.2d 42 (1956), *cert. denied*, 352 U.S. 1018 (1957), (2) *Curtis* v. *United States*, 222 A.2d 840 (D.C. Ct. App. 1966), and (3) *John Bad Elk* v. *United States*, 177 U.S. 529 (1900). In all three of these cases there is dictum, based on the early English rule, to the effect that a person may use force to resist an unlawful arrest. However, none of these cases squarely holds that a person may use force to resist an unlawful arrest.

(1) In *Abrams* v. *United States*, *supra*, this Court held that the District Court's refusal to give the requested instruction that a per-

Absent such a holding, the District Court was correct in applying sound public policy and determining that the law in this jurisdiction is that a person may not use force to resist an unlawful arrest. The District Court's interpretation of the law in this jurisdiction conforms to modern legal thinking.

The modern rule has been recently succinctly articulated by the Superior Court of New Jersey:

> * * * (A) private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances obtaining. *State* v. *Koonce*, 89 N.J. Super. 169, 184, 214 A.2d 428, 436 (1965).

Both the Uniform Arrest Act and the Model Penal Code have also recognized the modern view of the law. Section 5 of the Uniform Arrest Act provides:

> If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest.[16]

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son may use force to resist an unlawful arrest was not reversible error under the circumstances of the case.

(2) In *Curtis* v. *United States, supra*, the District of Columbia Court of Appeals held that a person who *verbally* protests an illegal arrest cannot be found guilty of disorderly conduct for the loud and boisterous verbal protest.

(3) In *John Bad Elk* v. *United States, supra*, the Supreme Court held that the killing of a police officer may be reduced from murder to manslaughter where the perpetrator, whose intent was to resist an unlawful arrest, lacked the requisite malice aforethought.

[16] See Warner, The Uniform Arrest Act, 28 VA. L. REV. 315, 345 (1942). A number of states have enacted legislation modeled after Section 5 of the Uniform Arrest Act. CAL. PENAL CODE § 834(a) (Supp. 1967); DEL. CODE ANN. tit 11, § 1905 (1953); ILL. STAT. ANN. ch. 38, § 7-7 (1964); N.H. REV. STAT. ANN. § 594:5 (1955); R.I. GEN. LAWS ANN. § 12-7-10 (1956).

Section 3.04 of the Model Penal Code (Official Draft 1962) provides in pertinent part:

> (a) The use of force is not justifiable under this Section:
>
> (i) To resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; * * *.

The modern rule that a person may not use force to resist an unlawful arrest is required by sound public policy:

> * * * (A)n appropriate accommodation of society's interests in securing the right of individual liberty, maintenance of law enforcement, and prevention of death or serious injury not only of the participants in an arrest fracas but of innocent third persons, precludes tolerance of any formulation which validates an arrestee's resistance of a police officer with force merely because the arrest is ultimately adjudged to have been illegal. Force begets force, and escalation into bloodshed is a frequent probability. The right or wrong of an arrest is often a matter of close debate as to which even lawyers and judges may differ. In this era of constantly expanding legal protections of the rights of the accused in criminal proceedings, one deeming himself illegally arrested can reasonably be asked to submit peaceably to arrest by a police officer, and to take recourse in his legal remedies for regaining his liberty and defending the ensuing prosecution against him. At the same time, police officers attempting in good faith, although mistakenly, to perform their duties in effecting an arrest should be relieved of the threat of physical harm at the hands of the arrestee.
>
> * * * *
>
> The concept of self-help is in decline. It is antisocial in an urbanized society. It is potentially dangerous to all involved. It is no longer necessary because of the legal remedies available. *State* v. *Koonce*, 89 N.J. Super. 169, 183-84, 214 A.2d 428, 435-436 (1965).

In our urbanized society of today, there is no valid reason for a rule allowing the use of force to resist an unlawful arrest:

(1) Today, one arrested and accused of a crime is taken immediately, after being processed by the police, before a commissioner or judge. FED. R. CRIM. P. 5(a). The person arrested is assured of a hearing with the advice of counsel to determine the lawfulness of the arrest. FED. R. CRIM. P. 5(b) and (c). And the person arrested is entitled under the Bail Reform Act of 1966 to be released either on his own personal recognizance or subject to certain conditions to assure his court appearance. 18 U.S.C. § 3146.[17]

Today, a person arrested need not fear the hardships that one might have endured during early English times when most arrests were made by private citizens. Then, long imprisonment could follow an illegal arrest because "bail for felonies was usually unattainable, and . . . years might pass before the royal judges arrived for a jail delivery. Further, conditions in the English jails were then such that a prisoner had an excellent chance of dying of disease [or physical torture] before trial." Warner, The Uniform Arrest Act, 28 VA. L. REV. 315, 315, 330 (1942). Self-help was essential for the individual in days of yore because the processes of law were inadequate to protect him. Today, of course, this is no longer true, and the fate of one arrested is usually no more than a few hours detention in a clean place.

(2) Today, because of modern firearms and other dangerous weapons, the possibility of serious injury to both the arresting police officer and the resistor is great. "Today, every peace officer is armed with a pistol and has orders not to desist from making an arrest though there is forceful resistance." Warner, *supra*, 28 VA. L. REV. at 330. Accordingly, the resistor will most likely

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[17] Moreover, the person arrested may vindicate himself civilly in a suit under the Civil Rights Act of 1871 (42 U.S.C. § 1983). *E.g.*, *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Basista* v. *Weir*, 340 F.2d 74 (3d Cir. 1965).

not succeed in his attempt to escape and may suffer serious injury as a result. Successful resistance is usually only possible by shooting the officer or inflicting serious bodily harm on him. Usually, the result of an individual forcibly resisting arrest will be his failure to escape arrest and injuries to both him and the police officer. The instant case provides an apt example.

(3) To permit the individual to forcibly resist an arrest on the basis of his judgment as to its legality is to permit him to act in folly. The individual is in no position to make an intelligent decision as to the legality of the arrest for "he cannot know what information, correct or incorrect, the officers may be acting upon." *United States* v. *Di Re*, 332 U.S. 581, 594 (1947). In those rare instances where resistance is actually being offered in the belief that the arrest is illegal, the resistor is invariably only acting on the belief that he is innocent of the crime.[18] But it is the difficult question of probable cause, not innocence or guilt, which determines the legality of an arrest. As the trial judge remarked in the case at bar:

> * * * (T)he idea that every time a person is arrested, he can determine in his own mind whether there was probable cause for his arrest, a matter that the courts in this country, including the Supreme Court, spend months and months and months arguing about in given cases . . . and use all force necessary to resist the arrest is . . . perfectly absurd, and I don't believe it is the law. (Tr. 50.)

(4) Society's interest in protecting the entire community from the threat of physical harm also demands that an individual peacefully submits to an arrest, regardless of its legality. It is the street altercation between the police officer who is attempting to perform his duties and the individual who forcibly resists that, in our urban society, has increasingly become the springboard to gen-

[18] Of course, the innocent are the least likely to forcibly resist an arrest and thereby risk making things worse. It is the guilty, who fear legal arrest and subsequent conviction and incarceration, that will most often forcibly resist arrest and attempt to escape.

eral rioting. The Report of the National Advisory Commission on Civil Disorders is sprinkled with examples of riots being ignited by individuals forcibly resisting arrest and assaulting police officers. See Report of the National Advisory Commission on Civil Disorders, Ch. 1 ("Profiles of Disorder"), 1968. "The former rule [of allowing forcible resistance to illegal arrests] . . . [has] led to riots and violence by fostering a belief on the part of many people that they were the sole judges as to whether their arrest was or was not proper." *People* v. *Burns*, 18 Cal. Rptr. 921, 922 (Super. Ct. App. Dept. 1962).

We know of no valid reason for the antiquated doctrine allowing the use of force to resist an illegal arrest. Appellants, however, suggest that "the objectives of maintaining civil order will not be served by compelling the citizenry to submit meekly to the policeman's abuse of his authority to arrest." Brief for Appellants, p. 18. But this argument was put to rest by the late Judge Learned Hand who stated:

> The idea that you may resist peaceful arrest * * * because you are in debate about whether it is lawful or not, instead of going to the authorities which can determine, * * * [is] not a blow for liberty, but, on the contrary, a blow for attempted anarchy. 1958 Proceedings, American Law Institute, p. 254. Cited in *United States* v. *Heliczer*, 373 F.2d 241, 246 n.3 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967).

(B)

In any event, there was no evidence at trial to support an instruction that a person may use force to resist an unlawful arrest. See *Abrams* v. *United States*, 99 U.S. App. D.C. 46, 237 F.2d 42 (1956), *cert. denied*, 352 U.S. 1018 (1957). There was no testimony at trial to the effect that appellants were resisting an unlawful arrest. Both appellants testified that they did not resist arrest; rather, they claimed that several police officers barged into the living room of Mrs. Jones' house and started beating on them for no apparent reason (Tr. 236-39, 245,

257-60, 261, 264, 266, 269, 271). The Government's evidence, on the other hand, showed that appellants were lawfully arrested and that appellants thereafter viciously attacked the police (Tr. 84, 85, 98, 115, 116, 117, 118, 123, 124, 125, 126, 128, 130, 172, 174).

(C)

Finally, the District Court determined as a matter of law that the arrest of appellants was lawful; therefore, no reason existed for the District Court to instruct the jury that a person may use force to resist an unlawful arrest (Tr. 152, 153).[19] The question of the legality of an arrest is left to the courts, and this is rightly so for two reasons. (1) Because of its long history of experience in determining the legality of arrests, the courts have peculiar expertise in this field. (2) The question of the legality of an arrest does not involve a determination of the subjective thoughts and motives of the accused.[20]

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[19] We also note that the jury's guilty verdict means that the jury accepted the Government's version of the facts which was that appellants were lawfully arrested.

[20] Appellants have also contended that the Government's evidence at trial was insufficient because it did not show that they were "without justifiable and excusable cause" when they assaulted, resisted and interfered with Officers Haines and Harris. Brief for Appellants, pp. 22-23. This contention is totally without merit. Reviewing the Government's evidence in its most favorable light, the Government proved that Clyde Montgomery, who was in a rage and shouting obscenities, pushed and kicked Officer Haines for no reason at all (Tr. 114, 115, 123, 124, 174). Officer Haines then placed Clyde under arrest, whereupon Clyde resisted (Tr. 115, 116, 124, 125-26, 172). Officer Haines pursued Clyde and when he took hold of Clyde's arm and started towards the door with him, Nyles Montgomery and Mack Edwards intervened and freed Clyde from Officer Haines' control (Tr. 82, 92, 116, 128). The Government's evidence clearly showed that Clyde had no justification for his initial assault on Officer Haines and that Nyles had no justification for interfering with Officer Haines in the performance of his duties. Furthermore, since there was no justification for appellants' initial conduct, there could be no justification for appellants' subsequent vicious assault on the police, absent excessive police force which the jury determined did not exist.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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